

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

THOMAS J. COLLMAN, )  
Plaintiff, ) Case No. 3:10-cv-00090-LRH-RAM  
vs. )  
HOWARD SKOLNIK, *et al.*, )  
Defendants. )

**ORDER**

Plaintiff, who is a Nevada inmate has submitted a Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (#2-1). Plaintiff has paid the initial installment toward the filing fee. The complaint is subject to the provisions of the Prisoner Litigation Reform Act as discussed below.

**I. Screening Pursuant to 28 U.S.C. § 1915A**

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed. *Balistrieri v. Pacifica Police Dep't*, 901 F.2d. 696, 699 (9<sup>th</sup> Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation

1 Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of  
 2 poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief may  
 3 be granted, or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.  
 4 § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted is  
 5 provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under  
 6 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a court dismisses  
 7 a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions  
 8 as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could  
 9 not be cured by amendment. *See Cato v. United States*, 70 F.3d. 1103, 1106 (9<sup>th</sup> Cir. 1995).

10 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*  
 11 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9<sup>th</sup> Cir. 2000). Dismissal for failure to state a claim  
 12 is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that  
 13 would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9<sup>th</sup> Cir. 1999). In making  
 14 this determination, the Court takes as true all allegations of material fact stated in the complaint, and the  
 15 Court construes them in the light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d  
 16 955, 957 (9<sup>th</sup> Cir. 1996). Allegations of a pro se complainant are held to less stringent standards than  
 17 formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404  
 18 U.S. 519, 520 (1972) (per curiam). While the standard under Rule 12(b)(6) does not require detailed  
 19 factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp.*  
 20 *v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). A formulaic recitation of the elements of a cause of action  
 21 is insufficient. *Id.*, *see Papasan v. Allain*, 478 U.S. 265, 286 (1986).

22 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the  
 23 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal  
 24 conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims of  
 25 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual  
 26 allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28  
 27 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9<sup>th</sup> Cir. 1991).

## II. Discussion

Plaintiff sues Defendants Howard Skolnik, Donald Helling, William Donat, Greg Smith and James Baca, all Nevada Department of Corrections officials, as well as Bret Metcalf the Nevada State Prison volunteer Chaplain in both their individual and official capacities for violation of 42 U.S.C. § 1983 and 42usc § 2000cc (RLUIPA).

6 The First Amendment to the United States Constitution provides that Congress shall make no  
7 law respecting the establishment of religion, or prohibiting the free exercise thereof. U.S. Const.,  
8 amend. I. The United States Supreme Court has held that prisoners retain their First Amendment rights,  
9 including the right to free exercise of religion. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).  
10 The Court has also recognized that limitations on a prisoner's free exercise rights arise from both the  
11 fact of incarceration and from valid penological objectives. *Id.*; *McElyea v. Babbit*, 833 F. 2d 196, 197  
12 (9th Cir. 1987).

13           Prison regulations alleged to infringe on the religious exercise right must be evaluated under the  
14 “reasonableness” test set forth in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). *O’Lone*, 382 U.S. at 349;  
15 *Freeman v. Arpaio*, 125 F.3d 732, 736 (9th Cir. 1997)(recognizing that the United States Supreme  
16 Court’s recent decision in *City of Boerne v. P.F. Flores*, 521 U.S. 507 (1997), invalidated the Religious  
17 Freedom Restoration Act and restored the “reasonableness test” as the applicable standard in free  
18 exercise challenges brought by prison inmates).

In determining the reasonableness of a challenged restriction on First Amendment rights, the court considers four factors. First, there must be a valid, rational connection between the prison regulation and the legitimate government interest put forward to justify it, and the governmental objective must itself be a legitimate and neutral one. A second consideration is whether alternative means of exercising the right on which the regulation impinges remain open to prison inmates. A third consideration is the impact accommodation of the asserted right will have on guards, other inmates, and the allocation of prison resources. Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. *Allen v. Toombs*, 827 F.2d 563, 567 (9th Cir. 1987) (citing *Turner v. Safley*, 482 U.S. at 89-91).

1 Plaintiff complains that he has been denied his rights under the First and Fourteenth  
 2 Amendments which guarantee his right to free exercise of his religion. He presents claims identified  
 3 as counts one through six, but the claims are actually factual examples of the denial of his right to  
 4 exercise his religion. He contends he has been denied visits of a clergy of his faith, he has been denied  
 5 an opportunity to meet confidentially with his clergy, he has been denied full immersion baptism by a  
 6 minister of his faith, he has been forced to accept the defendants' religious views and practices, and that  
 7 defendants have failed to act to approve and recognize his sincerely held beliefs.<sup>1</sup>

8 Plaintiff's religion is identified as the Philadelphia Church of God (PCG). While it appears to  
 9 be a well established Christian-based religion, it is not on the Nevada Department of Corrections' list  
 10 of recognized faith groups. Plaintiff alleges that he has been attempting to obtain review and approval  
 11 of his religious faith by the department's religious review committee since mid 2008, but the recognition  
 12 has been denied or delayed. This delay or failure to recognize the PCG as a faith group has denied  
 13 plaintiff the opportunity to observe the religious holidays and practices required by his faith. Plaintiff  
 14 has stated a claim for denial of his First Amendment rights. The complaint shall proceed on a First  
 15 Amendment claim. However, the complaint does not state a viable claim against defendant Metchalf,  
 16 who does not appear to be responsible in any way for the formation of the religious faith review  
 17 committee or its review of plaintiff's request.

18 Because the other officials, including Director Skolnik can be charged with the development and  
 19 enforcement of procedures related to religious practices within the prisons, they shall be required to  
 20 appear and answer.

21 **III. Conclusion**

22 Plaintiff's claim for denial of his First Amendment right to exercise his religion shall proceed.

23 **IT IS THEREFORE ORDERED** that the Clerk of the Court shall **FILE** the complaint.

24 **IT IS FURTHER ORDERED** that defendant Metcalf is **DISMISSED WITH PREJUDICE**.

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25  
 26 <sup>1</sup> In fact, as plaintiff admits in his pleading, although originally denied or delayed, he has been  
 27 allowed visits with a PCG clergy, he has been allowed to meet with that clergy privately, he has been  
 allowed to be baptized in conformance with his religious beliefs by the proper PGC clergy.

1           **IT IS FURTHER ORDERED** as follows:

2           1. The Clerk shall electronically serve a copy of this order, including the attached Notice  
3           of Intent to Proceed with Mediation form, along with a copy of plaintiff's complaint, on the Office  
4           of the Attorney General of the State of Nevada, to the attention of Pamela Sharp.

5           2. The Attorney General's Office shall advise the Court within **twenty-one (21) days** of the date  
6           of entry of this order whether it can accept service of process for the named defendants. As to any of  
7           the named defendants for which the Attorney General's Office cannot accept service, the Office shall  
8           file, *under seal*, the last known address(es) of those defendant(s).

9           3. If service cannot be accepted for any of the named defendant(s), plaintiff shall file a motion  
10          identifying the unserved defendant(s), requesting issuance of a summons, and specifying a full name  
11          and address for said defendant(s). Plaintiff is reminded that, pursuant to Rule 4(m) of the Federal Rules  
12          of Civil Procedure, service must be accomplished within one hundred twenty (120) days of the date the  
13          complaint was filed.

14          4. If the Attorney General accepts service of process for any named defendant(s), such  
15          defendant(s) shall file and serve an answer or other response to the complaint within **thirty (30) days**  
16          following the date of the early inmate mediation. If the court declines to mediate this case, an answer  
17          or other response shall be due within **thirty (30) days** following the order declining mediation.

18          5. The parties **SHALL DETACH, COMPLETE AND FILE** the attached Notice of Intent to  
19          Proceed with Mediation form on or before **thirty (30) days** from the date of entry of this order.

20          DATED this 8th day of October, 2010.



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**LARRY R. HICKS**  
25           UNITED STATES DISTRICT JUDGE  
26  
27  
28

1  
2 Name \_\_\_\_\_  
3 Prison Number (if applicable) \_\_\_\_\_  
4 Address \_\_\_\_\_  
5 \_\_\_\_\_  
6 \_\_\_\_\_  
7

8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF NEVADA

10 \_\_\_\_\_ Plaintiff,      )  
11                          )  
12 v.                      )  
13 \_\_\_\_\_                  )  
14                          )  
15 Defendants.            )  
16      Case No. \_\_\_\_\_

NOTICE OF INTENT TO  
PROCEED WITH MEDIATION

16 This case may be referred to the District of Nevada's early inmate mediation program. The  
17 purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by  
18 which the parties meet with an impartial court-appointed mediator in an effort to bring about an  
19 expedient resolution that is satisfactory to all parties.

- 20 1. Do you wish to proceed to early mediation in this case? \_\_\_\_\_ Yes \_\_\_\_\_ No  
21 2. If no, please state the reason(s) you do not wish to proceed with mediation? \_\_\_\_\_  
22 \_\_\_\_\_  
23 \_\_\_\_\_

- 24 3. List any and all cases, including the case number, that plaintiff has filed in federal or state court  
25 in the last five years and the nature of each case. (Attach additional pages if needed).  
26 \_\_\_\_\_  
27 \_\_\_\_\_  
28

1 \_\_\_\_\_  
2 4. List any and all cases, including the case number, that are currently pending or any pending  
3 grievances concerning issues or claims raised in this case. (Attach additional pages if needed).  
4 \_\_\_\_\_  
5 \_\_\_\_\_  
6 \_\_\_\_\_

7 5. Are there any other comments you would like to express to the court about whether this case is  
8 suitable for mediation. You may include a brief statement as to why you believe this case is suitable  
for mediation. (Attach additional pages if needed).  
9 \_\_\_\_\_  
10 \_\_\_\_\_  
11 \_\_\_\_\_  
12 \_\_\_\_\_

13 This form shall be filed with the Clerk of the Court on or before thirty (30) days from the date  
14 of entry of this order.

15 Counsel for defendants: By signing this form you are certifying to the court that you have  
16 consulted with a representative of the Nevada Department of Corrections concerning participation in  
mediation.

17 Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2010.  
18  
19 \_\_\_\_\_ Signature  
20  
21 \_\_\_\_\_ Name of person who prepared or  
22 helped prepare this document  
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